Supreme Court, U.S.
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88-458

No.

In The
Supreme Court of the United States
October Term, 1988

SK HAND TOOL CORPORATION
and
CORCORAN PARTNERS, LTD.,
PETITIONERS,

v.

DRESSER INDUSTRIES, INC.,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. What constitutes a "pattern of racketeering activity" under 18 U.S.C. §1962?*

2. Does 28 U.S.C. § 1920 allow $30,000.00 in deposition expenses to be taxed as costs against a plaintiff whose common law fraud claim has not yet been decided on the merits?

PARTIES TO THE PROCEEDING

The caption of the case in this Court contains the names of all parties to the proceeding in the Seventh Circuit (Supreme Court Rule 21.1(b)). On October 17, 1983, petitioner SK Hand Tool Corporation was incorporated as a wholly-owned subsidiary of petitioner Corcoran Partners, Ltd. On December 20, 1985, Facom Tools Holding Company purchased SK Hand Tool Corporation from Corcoran Partners, Ltd., and on that same date assigned all of its rights, title and interest in the lawsuit to Corcoran Partners, Ltd. SK Hand Tool Corporation has no subsidiaries or affiliates.

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* This Court has recently granted certiorari in a case presenting essentially this same question. *H.J. Inc. v. Northwestern Bell Telephone Company*, 108 S. Ct. 1219 (March 21, 1988).

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In The
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SK HAND TOOL CORPORATION
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CORCORAN PARTNERS, LTD.,
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v.

DRESSER INDUSTRIES, INC.,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners SK Hand Tool Corporation and Corcoran Partners, Ltd. pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, dated July 18, 1988, is not officially reported. The opinions of the district court, dated January 29, 1987 and November 24, 1987, are also not officially reported.

The Seventh Circuit Opinion is reprinted in the Appendix, beginning at page A-1. The district court opinions, dated January 29, 1987 and November 24, 1987, are reprinted in the Appendix, beginning at pages A-20 and A-35, respectively.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on July 18, 1988. (Appendix, A-39). This petition is timely, having been filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and 28 U.S.C. §2101(c).

STATUTORY PROVISIONS INVOLVED

The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§1961-1968 states, in relevant part:

§1961. Definitions.

As used in this chapter–

> (5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity; . . .

28 U.S.C. §1920:

A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

STATEMENT OF THE CASE

This petition seeks review of a judgment of the United States Court of Appeals for the Seventh Circuit upholding the decision of the district court dismissing petitioners' claim that respondent had violated the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, and awarding certain costs against petitioners.

Subject matter jurisdiction in the district court was based on 28 U.S.C. § 1331 as to the RICO claim and principles of pendant jurisdiction as to the common law fraud claim.

Petitioners' RICO claim alleged a scheme by a group of respondent's employees to deceive respondent's directors and the investing public as to the financial condition of respondent's Hand Tool Division. Petitioners further alleged that this scheme later converged with a second scheme to defraud petitioners in their purchase of the Hand Tool Division and to obtain money from them by fraudulently misrepresenting the financial condition of the Hand Tool Division.

On January 29, 1987, the district court granted respondent's motion to dismiss the RICO claim on the grounds that petitioners had failed to allege a pattern of racketeering activity as required under the statute. On July 28, 1987, a final judgment was entered dismissing the pendant common law fraud claim as a matter of discretion.

On November 24, 1987, the district court assessed costs against petitioners in the amount of $41,318.50, including a $30,000.00 award for deposition expenses.

REASONS FOR GRANTING THE WRIT

1. CERTIORARI SHOULD BE GRANTED ON THE RICO ISSUE BECAUSE A CONFLICT EXISTS AMONG THE APPELLATE COURTS AS TO THE CORRECT INTERPRETATION OF THE PATTERN REQUIREMENT OF THE RICO ACT.

This Court has recently granted certiorari in a case presenting essentially the same RICO issue presented here. *H.J. Inc. v. Northwestern Bell Telephone Company*, 108 S. Ct. 1219 (March 21, 1988).

To state a cause of action under the RICO statute, a plaintiff must allege that the activity complained of constitutes a "pattern of racketeering activity." 18 U.S.C. §1962. The only guidance in the statute on what constitutes a "pattern of racketeering activity" is in the definition of that phrase, where the statute says that a ""pattern of racketeering activity" requires at least two acts of racketeering activity" occurring within ten years of each other. 18 U.S.C. §1961.5.

This Court shed some light on the "pattern" requirement in *Sedima, S. P. R. L. v. Imrex Co., Inc.*, 473 U.S. 479 (1985). In that case, the Court indicated that a plaintiff must allege that there is *"continuity plus relationship"* between the individual predicate acts alleged. *Sedima*, 473 U.S. at 496, n. 14. Since the *Sedima* decision, however, the appellate courts have developed varying and even conflicting views of what constitutes "continuity plus relationship" and therefore, what constitutes a "pattern of racketeering activity" under RICO. *Morgan v. Bank of Waukegan*, 804 F. 2d 970, 974 (7th Cir. 1986). The opinions supporting these conflicting views are irreconcilable. The Seventh Circuit's approach in the instant case has been specifically rejected by other appellate courts.

The appellate court approaches to the pattern requirement range from extremely narrow interpretations to fairly broad ones. On one end of the spectrum, the Eighth Circuit has held that where predicate acts are all committed in furtherance of a single scheme, there is no pattern of racketeering activity, thereby indicating that the plaintiff must allege more than one scheme. *Superior Oil Company v. Fulmer*, 785 F. 2d 252, 257 (8th Cir. 1986). This approach was again followed by the Eighth Circuit in the case of *H.J. Inc. v. Northwestern Bell Telephone Company*, which is pending before this Court on the pattern issue. *H.J. Inc.*, 829 F. 2d 648, 650 (8th Cir. 1987), *cert. granted*, 108 S. Ct. 1219 (March 21, 1988).

Perhaps the broadest approach is found in the Eleventh Circuit case of *Bank of America National Trust and Savings Association v. Touche Ross & Company*, 782 F. 2d 966 (11th Cir. 1986). In that case, the Eleventh Circuit rejected the view that predicate acts must take place in different episodes or schemes to satisfy the pattern requirement. *Bank of America*, 782 F. 2d at 971. The court then held that nine acts of mail fraud, over three years involving the same parties were sufficient to satisfy the requirement. *Bank of America*, 782 F. 2d at 971.

The Second, Third, Fifth, and Ninth Circuits have also rejected the multiple scheme or episode approach and have applied the pattern requirement in a fashion similar to that of the Eleventh Circuit. *United States v. Ianniello*, 808 F.2d 184, 192 (2nd Cir. 1986), *cert. denied*, 107 S. Ct. 3229, 3230 (June 22, 1987) (two acts with a common purpose of furthering a continuing criminal enterprise constituted a pattern); *Barticheck v. Fidelity Union Bank/First National State*, 832 F. 2d 36, 38-40 (3rd Cir. 1987) (two acts of mail fraud constituted a pattern); *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F. 2d 1350, 1355 (5th Cir. 1985) (two acts of mail fraud in the course of a single fraudulent scheme constituted a pattern); and *Sun Savings and Loan*

Association v. Dierdorff, 825 F. 2d 187, 193, 196 (9th Cir. 1987) (four acts of mail fraud used to cover up a kickback scheme constituted a pattern).

The Seventh Circuit at one time seemed to side with the appellate courts that have taken a broader approach to the pattern requirement. In *Morgan v. Bank of Waukegan*, 804 F.2d 970 (7th Cir. 1986), the Seventh Circuit stated that "the mere fact that the predicate acts relate to the same overall scheme or involve the same victim does not mean that the acts automatically fail to satisfy the pattern requirement." *Morgan*, 804 F. 2d at 975-976. However, in the instant case, the Seventh Circuit has narrowed its approach to the pattern requirement by stating that "a defendant's involvement in multiple schemes is important evidence of a pattern of racketeering activity." (Appendix, A-9). The court then held that "[a]lthough several acts of mail and wire fraud were involved" in the scheme to misrepresent the value of respondent's Hand Tool Division to petitioners, this was not sufficient to constitute a pattern of racketeering activity because "[t]he predicate acts resulted in only one transaction, which caused only one harm to one victim." (Appendix, A-13).

A decision by this Court interpreting the pattern requirement of the RICO Act in this case could resolve the conflicts between the appellate courts.

2. CERTIORARI SHOULD BE GRANTED ON THE COSTS ISSUE BECAUSE THE SEVENTH CIRCUIT DECISION IS IN CONFLICT WITH THIS COURT'S DECISION IN *CRAWFORD FITTING CO. V. J.T. GIBBONS, INC.*, 107 S. Ct. 2494 (1987).

In *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, this Court held that 28 U.S.C. §1920 contains an exclusive list of the expenses that a federal court may tax as costs. *Crawford Fitting*, 107 S. Ct. at 2497. This Court specifically held in that case that §1920 precludes the taxation of costs

not listed in that section. *Crawford Fitting*, 107 S. Ct. at 2497. In applying this rule to the permissive language of Federal Rule of Civil Procedure 54(d), this Court stated that the discretion granted by Rule 54(d) "is solely a power to *decline to tax*, as costs, the items enumerated in §1920." *Crawford Fitting*, 107 S. Ct. at 2498 (emphasis added).

The ruling in *Crawford Fitting* clearly precludes the taxation of any costs for expenses not delineated in §1920. However, in this case, the Seventh Circuit interpreted the Supreme Court decision to allow the taxation of expenses for depositions as costs "[e]ven though section 1920 does not specifically mention depositions." (Appendix, A-15). The Seventh Circuit held that "deposition transcripts are taxable under section 1920(2) as "stenographic transcript[s]." (Appendix, A-14) (citation ommitted). This interpretation is in direct conflict with the crystal clear language of the *Crawford Fitting* decision in that it attaches an inclusive meaning to §1920, and at the same time concludes that this interpretation is consistent with the decision in *Crawford Fitting* which attached an exclusive meaning to the section.

A decision by this Court is necessary to clarify whether deposition expenses which are not specifically delineated in §1920 may nevertheless be interpreted to be included in that section as taxable costs.

CONCLUSION

Resolution of the foregoing conflicts and ambiguities is needed by this Court. Therefore, the petition for writ of certiorari should be granted and the judgment should be reversed.

Dated: September 12, 1988

Respectfully Submitted,

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APPENDIX

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 87-2294 and 87-3067

SK HAND TOOL CORPORATION and
CORCORAN PARTNERS, LTD.,

Plaintiffs-Appellants,

v.

DRESSER INDUSTRIES, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 84 C 4506—**Frank J. McGarr**, *Judge.*

ARGUED APRIL 18, 1988—DECIDED JULY 18, 1988

Before CUMMINGS, CUDAHY and EASTERBROOK, *Circuit Judges.*

CUDAHY, *Circuit Judge.* Plaintiffs, Corcoran Partners and its subsidiary, SK Hand Tool Corporation ("Corcoran"), appeal the dismissal of Count IV of their third amended complaint. Count IV alleges that Dresser Industries ("Dresser") violated the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, in committing various acts of mail and wire fraud in furtherance of a scheme to overstate the value of its hand

tool division.[1] The district court dismissed this count pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim because Corcoran had failed to allege that Dresser had engaged in a "pattern of racketeering activity," a prerequisite to RICO liability. Corcoran also appeals the district court's award of costs to Dresser. Dresser, in turn, asks us to impose sanctions on Corcoran for undertaking allegedly frivolous appeals. We affirm and deny sanctions on appeal.

I.

In reviewing the dismissal of a civil RICO complaint, this court construes all allegations as true and views them in a light most favorable to the plaintiff. *Morgan v. Bank of Waukegan*, 804 F.2d 970, 973 (7th Cir. 1986). Hence, we describe the facts as alleged by Corcoran in its third amended complaint.

Dresser is a large manufacturing company in Dallas with a hand tool division located in Chicago. Perhaps because the division was losing money, certain Dresser employees who managed it embarked on a scheme to conceal its true financial condition from Dresser officers and directors, as

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[1] Corcoran seeks to recover treble damages under 18 U.S.C. § 1964(c) for Dresser's alleged RICO violations, *id.* § 1962(a)-(c).

Under section 1962(a), it is illegal for any person who has received income derived from a pattern of racketeering activity to use any part of it to acquire an interest in, or to operate, an enterprise engaged in interstate commerce. Corcoran alleges that Dresser violated section 1962(a) by receiving income from the sale of the division through a pattern of racketeering activity and using that income in the operation of the company.

Corcoran also alleges that Dresser violated section 1962(b), which prohibits a person from gaining or maintaining an interest in any interstate enterprise through a pattern of racketeering activity. Dresser also allegedly violated section 1962(c), which prohibits any person associated with any interstate enterprise from conducting the affairs of that enterprise through a pattern of racketeering activity.

well as from the investing public. Although the complaint does not indicate how the employees managed this deception, Corcoran has elsewhere explained that various accounting practices were followed enabling the hand tool division effectively to borrow from the future to reduce its current losses. The complaint does not explain who devised the scheme, who was aware of it nor who remained uninformed.

In 1983, Dresser decided to sell its hand tool division to Corcoran. To this end, Rex Sebastian, Dresser's Senior Vice President of Operations in Dallas, spoke several times by telephone with William Downey, President of Dresser's Tool Group in Chicago, about Corcoran's letter of intent to purchase the division, Dresser's letter of intent to sell and the division's warranty liability. It is uncertain whether Sebastian was thereby informed of the scheme to overstate the value of the division. The complaint suggests that he may not have been aware of the division's true value.

On August 4, 1983, after speaking with Downey, Sebastian called Thomas Corcoran, one of Corcoran's principal partners, in Chicago to discuss the terms of the sale of the division. Five days later, Corcoran called Sebastian to inform Dresser that his partnership agreed to the terms and would proceed with the transaction. The parties agreed to base the price of the division on the numbers shown on the Effective Date Balance Sheet. Beginning in September 1983, Daniel Czuba, another principal partner in Corcoran, sought additional information about the division. During this investigation, Dresser employees blatantly misrepresented the division's financial condition in furtherance of their scheme. Czuba asked Downey about the liabilities associated with outstanding "lifts" to which the division was committed.[2] Downey falsely replied, "Prac-

[2] "Lifts" are a means for a manufacturer to obtain shelf space for its product by extending purchase credit to a wholesaler or retailer who agrees to deplete his inventory of products of the manufacturer's competitors and to buy the manufacturer's products.

tically nothing." In fact the division had about $1.3 million in lift obligations, $1 million of which Downey had personally approved.

In October 1983, John Macauley, Controller of the Tool Group, told Czuba that the division's accounting practices differed from Generally Accepted Accounting Principles ("GAAP") only with respect to intracompany transfers, even though he knew that the division's accounting practices differed drastically from GAAP in a number of areas, none of which involved intracompany transfers. Czuba then asked Macauley for a list of the division's obsolete inventory. Although Macauley did not let Czuba see the list, he promised to furnish accurate figures of the obsolete inventory. The figures he provided, however, were inaccurate, since two items had been improperly removed from the list. In addition, George Fansmith, Controller of the division, told Czuba that the division had accrued a liability for cooperative advertising allowance, but such an accrual was not included as a liability on the division's balance sheet.

On October 10, Dresser mailed Corcoran a draft of the purchase agreement. On December 13, Dresser mailed Corcoran the final Effective Date Balance Sheet, on the basis of which the purchase price would be set. Paragraph 3.2 of the Purchase Agreement stated that the Effective Date Balance Sheet would "fairly present in all material respects the asset values and liabilities for the items reflected thereon as of the Effective Date." The Effective Date Balance Sheet, however, did not in fact fairly present the division's assets and liabilities, and Dresser allegedly knew this. As a result, the closing purchase price was overstated.

Realizing it had paid too much for Dresser's hand tool division, Corcoran, pursuant to the purchase agreement, submitted its claim to arbitration. Unhappy with the arbitrator's determination that it had overpaid Dresser by only $1.386 million, Corcoran brought an action in district court alleging fraud, breach of contract and RICO violations. With respect to the RICO count, Corcoran charged

that Dresser had profited from a pattern of racketeering activity by engaging in various acts of mail and wire fraud that were committed in furtherance of a scheme (originally designed to deceive Dresser officers and directors) to defraud Corcoran in the sale of the hand tool division.[3]

Following the Supreme Court's decision in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), the district court denied Dresser's first motion to dismiss, concluding that Corcoran had alleged a pattern of racketeering activity under RICO. The court found it sufficient to allege that "Dresser engaged in numerous acts of related racketeering activity over a continuous period of time in furtherance of their [sic] scheme to defraud plaintiffs." *Corcoran Partners, Ltd. v. Dresser Indus., Inc.*, No. 84 C 4506, mem. op. at 7 (N.D. Ill. Dec. 18, 1985).

Two years later, the court granted Dresser's renewed motion to dismiss in light of *Lipin Enterprises, Inc. v. Lee*, 803 F.2d 322 (7th Cir. 1986), and *Morgan*, 804 F.2d 970. It held that multiple acts of mail and wire fraud causing a single injury to a single victim in a single transaction do not form a pattern of racketeering activity. *Corcoran Partners, Ltd. v. Dresser Indus., Inc.*, No. 84 C 4506, mem. op. at 9 (N.D. Ill. Jan. 29, 1987).

II.

In a civil RICO action, a plaintiff must prove that a defendant engaged in a "pattern of racketeering activity." 18 U.S.C. § 1962(a)-(c). "Racketeering activity" includes mail and wire fraud.[4] *Id.* § 1961(1)(B). In its definitional

[3] The acts of mail and wire fraud include: (1) telephone conversations between Sebastian and Downey, both of whom worked for Dresser, concerning letters of intent; (2) telephone conversations between Sebastian and Corcoran about the terms of the sale; and (3) letters sent by Dresser to Corcoran concerning the Effective Date Balance Sheet and the Purchase Agreement.

[4] A person commits mail or wire fraud by using the mails or wires for the purpose of executing a scheme or artifice to defraud. 18 U.S.C. §§ 1341, 1343.

section, the statute simply states that a " 'pattern of racketeering activity' requires at least two acts of racketeering activity" occurring within a ten-year period. *Id.* § 1961(5). The Supreme Court, in its famous footnote 14 to *Sedima*, attempted to put some flesh on the statute's skeletal definition. Essentially the Court advised that there must be "continuity plus relationship" among the various acts of racketeering activity to constitute a pattern. *Sedima*, 473 U. S. at 496 n.14.[5]

Since *Sedima*, this court has faced an astonishing number of cases involving the issue whether defendants had engaged in a pattern of racketeering activity. *See Jones v. Lampe*, 845 F.2d 755, 756 n.4 (7th Cir. 1988) (citing previous cases). We have avoided, either by accident or design, the formulation of any controlling definition of "pattern." The absence of an explicit definition has at least preserved the flexibility needed to make some sense out of civil RICO cases. Presumably (although there is no real way of knowing) we have complied with the Supreme Court's requirement that there be "continuity and relationship among the predicate acts" to constitute a pattern. *Morgan*, 804 F.2d at 975. In what is essentially a fact-specific inquiry, we consider a number of relevant factors, including: "the number and variety of predicate acts and the length of time over which they were committed, the number of victims, the presence of separate schemes

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[5] The Supreme Court reasoned that:

> while two acts [of racketeering activity] are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not generally form a "pattern." The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern. As the Senate Report explained: "The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern."

Sedima S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 n.14 (1985) (Supreme Court's emphasis) (citation omitted).

and the occurrence of distinct injuries." *Id.* This approach allows us, consistent with Congress' intent "to promote aggressively private actions for those injured by racketeering activity," to allow civil remedies "where a true 'pattern' of prohibited activity [exists], not just sporadic or isolated instances of fraud." *Jones v. Lampe*, 845 F.2d at 757.

We agree with the district court that this case closely resembles the situation in *Lipin*. There, we held that twelve acts of mail fraud furthering several misrepresentations of the value of a company for sale did not comprise a pattern of racketeering activity. *Lipin*, 803 F.2d at 324. The defendant had overstated the net worth of the company that the plaintiff had purchased, and it had also omitted several equipment and open-end leases from the lease inventory upon which the plaintiff had relied in deciding to buy the company. *Id.* at 323. In refusing to find a pattern of racketeering activity, we noted that the defendant's mailings defrauded only the purchaser on only one occasion (the sale of the company).[6] *Id.* at 324. In a subsequent case, we offered a more complete explanation of our decision in *Lipin*:

> The mere fact that the complexity of the transaction generates numerous pieces of paper and hence a greater number of possible fraudulent acts does not make these predicate acts ongoing over a period of time so as to constitute separate transactions that are distinct in time and place. Since these predicate acts were all made in a fairly short period of time

[6] We specifically stated the following:

> Lipin's complaint alleges racketeering acts all designed to defraud one victim, Lipin, on one occasion, the sale of Rifco. Lipin cannot allege that the defendants defrauded another victim with similar racketeering activity and cannot allege that Lipin has been defrauded more than once by the defendants through similar racketeering acts.

Lipin Enterprises, Inc. v. Lee, 803 F.2d 322, 324 (7th Cir. 1986).

> (several months), and all clearly relate to the same transaction (the acquisition of a large block of stock), involve a single scheme and a single victim, and create a single injury, the acts in *Lipin* do not satisfy the continuity aspect of the pattern of racketeering activity.

Morgan, 804 F.2d at 976-77.

In the present case, Dresser's several acts of mail and wire fraud resulted in a single transaction. These predicate acts were committed over the course of a few months in furtherance of a scheme to receive more for the division than it was worth, but they defrauded only one victim (Corcoran) on only one occasion (the sale of the division). The fraudulent misrepresentations were directed specifically at Corcoran for the sole purpose of inducing it to buy the division at an inflated price. The misrepresentations cannot fairly be viewed as constituting separate transactions, a key factor under *Lipin* and *Morgan*, since they did not have any effect on Corcoran until it decided to buy the division. Moreover, as in *Lipin*, there has been no threat of continuing fraudulent activity by Dresser after the division was sold.[7]

Corcoran nevertheless seeks to distinguish its case from *Lipin* on the grounds that it involved multiple schemes. This circuit rejected a *per se* rule requiring the presence of separate schemes in *Morgan*. 804 F.2d at 975. Despite this basic stance, it might be of interest that, of the eight

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[7] In *Lipin*, we cautioned:

> Whatever more is required to allege a pattern of racketeering activity, that something more is lacking here. The pattern requirement was intended to limit RICO to those cases in which racketeering acts are committed in a manner characterizing the defendant as a person who regularly commits such crimes. RICO is not "aimed at the isolated offender." There must be some indication of a "threat of continuing activity" by the defendants, not just one instance of fraud with a single victim.

Id. (citations omitted).

post-*Morgan* cases in which we found single schemes, we were willing to find a pattern of racketeering activity in only two. *See Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1305 (7th Cir. 1987) (each falsely prepared invoice deprived plaintiff of rent or replacement value); *Appley v. West*, 832 F.2d 1021, 1028 (7th Cir. 1987) (each act of mail fraud furthered the conversion of funds from separate bank accounts). In a recent clarification of the pattern requirement, a panel of this court identified these two cases as exceptions to a trend associating a pattern of racketeering activity with multiple schemes. *Jones v. Lampe*, 845 F.2d at 758-59. These observations, of course, must be read in connection with *Morgan* which, as noted, rejected a multiplicity of schemes as the definite touchstone.

In any event, a defendant's involvement in multiple schemes is important evidence of a pattern of racketeering activity. Thus, in an effort to demonstrate more than one scheme, Corcoran alleges in its complaint that the scheme to misrepresent the division's true value was more than a plan to defraud Corcoran; its original design was to conceal the division's heavy losses from various Dresser officers and directors. Corcoran asserts that, in effect, two schemes converged: the first scheme, executed by division employees, deceived Dresser officers and directors; the second, executed by Dresser through the sale of the division, defrauded Corcoran.

In a suit against Dresser, the only relevant scheme is the one perpetrated by Dresser to defraud Corcoran. There are two obstacles to holding Dresser responsible for acts of the division employees in concealing, from the officers and directors, the division's true financial condition. First, Corcoran is essentially asking us to consider Dresser both a victim and a perpetrator of the same misrepresentations. This we decline to do, for the primary purpose of RICO is to "reach those who ultimately profit from racketeering, not those who are victimized by it." *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 402 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985). Dresser cannot be counted as a victim of its employees'

fraud if it gained from the fraud when it sold the division to Corcoran. Second, if the division employees truly defrauded the officers and directors, the division employees, not Dresser itself, defrauded Corcoran. Dresser would have been merely an "unwilling conduit" of the employees' fraud, unaware that it was selling the division for more than it was worth. Dresser cannot be held vicariously liable under RICO for the independent acts of its employees. *D & S Auto Parts, Inc. v. Schwartz*, 838 F.2d 964, 968 (7th Cir.), *cert. denied*, 56 U.S.L.W. 3849 (June 13, 1988).

Moreover, the gravamen of Corcoran's complaint is that Dresser committed fraud in the sale of the division. This requires us to accept that Dresser's key officers and directors knew that they were misrepresenting the division's financial condition to Corcoran. Acceptance of this allegation precludes us from accepting that Dresser was somehow deceived by the division employees. If Dresser was not deceived by the employees of the hand tool division, then the only victim of the scheme is Corcoran and there was, in reality, only one scheme.[8]

Of course, it could be argued that the division employees' scheme to overstate its financial condition also defrauded investors in Dresser who relied on the fairness of the market price of the company's stock in buying or selling it. With this gloss, the scheme could have multi-

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[8] In the recent case of *Jones v. Lampe*, a bank allegedly had engaged in a single fraudulent loan transaction. We rejected the plaintiffs' characterization of the bank's "cover-up" activities as a separate scheme. To do so, we feared, would turn every transaction "into a 'multiple scheme' if the defendant denies wrongdoing." *Jones v. Lampe*, 845 F.2d 755, 759 (7th Cir. 1988).

Similarly, in the case before us, were we to accept Corcoran's "two-scheme" argument, we would be required to find a multiple scheme transaction every time some but not all of the employees of a defendant corporation were aware of the fraudulent conduct, because it would be fairly simple for a plaintiff to allege that some of the employees were defrauding others.

ple victims. Indeed, Corcoran pleads in its complaint that one of the effects of the scheme was to "deceive . . . the investing public as to the financial condition of the Hand Tool Division and Dresser." Corcoran, however, abandons this contention in its brief on appeal, choosing instead to focus exclusively on the deception of certain officers and directors of Dresser.

Even considering this "fraud on the public" allegation in the complaint, we cannot validly accept a claim that Dresser defrauded investors generally. Corcoran's complaint contains no well-pleaded facts permitting us to conclude that some investors may have been hurt by the alleged fraud. The complaint does not tell us, for example, whether the price of Dresser stock reflected the misrepresented value of the division, whether any investor relied on the accuracy of the division's value as represented or whether any investor was injured in so relying. We do not know from the complaint how the employees originally overstated the division's financial condition or whether the overstatement amounted to fraud. The public may well not have been affected by misrepresentations of the division's value; perhaps only Dresser's officers and directors were misled.

Moreover, the allegation that the employees' scheme defrauded the investing public, as well as Dresser officers and directors, does not circumvent the problem of imposing vicarious liability on Dresser. If Dresser cannot be held responsible under RICO for the scheme of its employees to deceive Dresser officers and directors, it likewise cannot be vicariously liable even when that scheme misleads the investing public.

In addition, the alleged acts of mail and wire fraud furthered only the scheme to defraud Corcoran. The telephone calls between Sebastian and Downey, as well as the correspondence between Dresser and Corcoran, all pertained to the sale of the division. Corcoran has failed to allege any acts of mail or wire fraud, or other instances of racketeering activity, that executed a scheme to defraud the investing public in the sale of securities.

Although we can conceive of a situation in which a company's scheme to misrepresent the value of a division could defraud both those who trade in the company's stock and the party who eventually purchases the division, this is not such a case. To show two victims, plaintiffs, at a minimum, would have to allege that the company's misrepresentations artificially inflated its stock price, that certain investors relied on those misrepresentations in purchasing the stock and that they were harmed by the misrepresentations. Corcoran has not alleged as much; accordingly, we reject its contention that Dresser's racketeering activity involved multiple victims.

We also reject Corcoran's assertion that it suffered multiple injuries. Corcoran likens this case to *Liquid Air*, where we held that "repeated infliction of economic injury upon a single victim of a single scheme is sufficient to establish a pattern of racketeering activity for purposes of civil RICO." 834 F.2d at 1305. In *Liquid Air*, the defendant had engaged in a seven-month scheme of falsifying nineteen separate shipping orders documenting returns to the plaintiff of leased gas cylinders that had never been made. The defendant, through its fraud, had been saving rental and replacement fees for the cylinders, while retaining the cylinders for its own use. With each falsified order, the defendant was depriving the plaintiff of rent or replacement value for the cylinders. Thus, each predicate act caused plaintiff distinct economic harm.

This case does not involve the "repeated infliction of economic injury." *Id.* The acts of mail and wire fraud did not each cause separate harms to Corcoran. Instead, the acts, which amounted to various fraudulent misrepresentations, contributed to a single economic injury. Only when Corcoran actually bought the division did the several misrepresentations combine to create the harm of paying more for the division than it was worth. Corcoran's many asserted injuries—having to honor outstanding lift commitments, recognizing the liability of a cooperative advertising allowance that was not on the books and bearing a cut in marketing costs—either stemmed from or were a

part of the single harm resulting from the purchase of the division.

We thus conclude that Dresser's misrepresentation of the hand tool division's true financial condition does not constitute a pattern of racketeering activity. That the scheme may have originated before Dresser decided to sell the division does not matter for our purposes. Although several acts of mail and wire fraud were involved, they were all committed after Corcoran expressed its desire to buy the division. The predicate acts resulted in only one transaction, which caused only one harm to one victim.

III.

Corcoran also appeals the district court's award of costs to Dresser in the amount of $41,318.50. In seeking a remand on this issue, Corcoran's burden is great, for district courts have broad discretion to determine whether and to what extent costs may be awarded to prevailing parties. As long as there is statutory authority for allowing a particular item to be taxed as a cost, we will not overturn a district court's decision that the cost was necessary to the litigation nor its determination of what amount is reasonable, absent, of course, a showing of clear abuse of discretion. *State of Illinois v. Sangamo Constr. Co.*, 657 F.2d 855, 864 (7th Cir. 1981). Thus, we review carefully whether an expense is recoverable, but when we determine that it is, we defer to the district court, which "is in the best position to determine the reasonableness of the cost." *Id.*

The district courts derive their authority to tax costs from Fed. R. Civ. P. 54(c), which states in part:

> Except when express provision therefor is made either in a statute of the United States or in fixed rules, costs shall be allotted as of course to the prevailing party unless the court otherwise directs . . . .

Under 28 U.S.C. § 1920, a federal court may tax as costs:

> (1) Fees of the clerk and marshall;
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> (3) Fees and disbursements for printing and witnesses;
>
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
>
> (5) Docket fees under section 1923 of this title.

Corcoran argues that the district court awarded deposition transcript costs, which represented the bulk of the award, in violation of section 1920. According to Corcoran, because deposition transcript costs are not enumerated in section 1920, which has been determined by the Supreme Court to be an exhaustive list of costs taxable in favor of prevailing parties, the court was without authority to award them to Dresser. *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 107 S. Ct. 2494, 2497 (1987).

We have held, however, that deposition transcripts are taxable under section 1920(2) as "stenographic transcript[s]." *Hudson v. Nabisco Brands, Inc.*, 758 F.2d 1237, 1242-43 (7th Cir. 1985). Thus, the issue arises whether *Crawford Fitting* overrules our interpretation of section 1920(2).

We agree with Corcoran that the Supreme Court's decision "illustrates that a more restrictive and limited approach should be taken in awarding costs." Brief for Appellants at 12-13. The Court explicitly rejected Rule 54(d) as "a separate source of power to tax as costs expenses not enumerated in § 1920." *Crawford Fitting*, 107 S. Ct. at 2497. Prior to this decision, courts had relied on the language in the rule, "unless the court otherwise directs," to exercise their discretion occasionally to award costs not explicitly allowed by statute. *Id.* at 2500 (Marshall, J.,

dissenting); *see, e.g., Sangamo Construction*, 657 F.2d at 864 & n.11; *Wahl v. Carrier Mfg. Co.*, 511 F.2d 209, 215-18 (7th Cir. 1975).

The district court here, however, did not award costs outside statutory authority. In fact, it explicitly limited itself to those costs enumerated in section 1920. Thus, the court must have viewed deposition transcripts as covered by section 1920.

Even though section 1920 does not specifically mention depositions, we do not think that *Crawford Fitting* necessarily precludes courts from finding that deposition transcripts are authorized by that statute. We agree with the Fifth Circuit that the Supreme Court did not "prevent courts from interpreting the meaning of the phrases used in § 1920." *West Wind Africa Line, Ltd. v. Corpus Christi Marine Servs.*, 834 F.2d 1232, 1238 (5th Cir. 1988); *see also La Vay Corp. v. Dominion Fed. Savs. & Loan Ass'n*, 830 F.2d 522, 528 (4th Cir. 1987) (reasonably necessary deposition transcript costs may be recoverable but *Crawford Fitting* requires denial of certain expert fees), *cert. denied*, 108 S. Ct. 1027 (1988); *Furr v. AT&T Technologies, Inc.*, 824 F.2d 1537, 1550 (10th Cir. 1987) (section 1920 permits recovery for deposition transcripts and *Crawford Fitting* limits the recovery of expert witness fees). Thus, we hold that deposition transcript costs may be awarded under section 1920(2).[9]

Alternatively, Corcoran argues that the district court arbitrarily arrived at $30,000 in awarding deposition transcript costs. We agree that the district court did not describe the process by which it determined that figure. The court, however, did purport to ascertain which deposition

[9] Similarly, pretrial transcript costs in the amount of $40 were properly taxed under section 1920(2).

costs were "reasonably incurred." We are not willing to say that it abused its discretion in this regard.[10]

Similarly Corcoran argues that the award of $10,000 for photocopying costs was arbitrary. Although we would have preferred the district court to explain why $10,000 was a reasonable amount, we cannot say that it abused its discretion in arriving at that amount. Dresser sought $18,631.92. The court responded to this "extraordinarily large" request by drastically reducing the award. We will not overturn this decision.

Corcoran complains next that most of Dresser's witnesses were paid more than the $30 provided by 28 U.S.C. § 1821. Dresser responds that in its claim for witness fees, it expressly included mileage allowance calculated under section 1821. Thus, although Dresser may not have properly documented its request (with, for example, receipts), the court was entitled to rely on Dresser's representation that it complied with the statute.

Corcoran also contends that, although the district court agreed that it would be unjust to tax all costs associated with the fraud claim (which was at that time pending in state court), the district court never *explicitly* made any deductions from Dresser's claimed costs to account for this. In Corcoran's view, the district court should have requested Dresser to submit a bill illustrating which costs were incurred in conducting discovery in the fraud claim. Such a requirement of Dresser would have been unreasonable. Corcoran filed a four-count complaint against

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[10] We also reject Corcoran's argument that the award of the deposition transcript costs violated Local Rule 45(b) because they included miscellaneous charges. Local Rule 45(b) states in part:

> Except as otherwise ordered by the court, only the cost of the original of such transcript or deposition together with the cost of one copy each where needed by counsel . . . shall be allowed.

In our view the rule permits the court some discretion to tax more than just the original transcript plus one copy.

Dresser. Some of the costs incurred could have been associated with more than one of Corcoran's claims. Discovery on the fraud and RICO claims, for example, undoubtedly overlapped. Thus, we accept the district court's explanation that it was not able mathematically to deduct expenses associated with the fraud claim, but that, in arriving at its judgment, it bore in mind the principle that they should not all be recoverable.[11]

Corcoran's final argument is that Dresser should not be allowed to recover any discovery costs associated with the RICO count, which was dismissed on the pleadings. The district court rejected this contention and we agree that "there is no requirement that the discovery cease during the pendency of a motion to dismiss unless the court has ordered a stay, which it has not done in this case." *Corcoran Partners, Ltd. v. SK Hand Tool Corp.*, No. 84 C 4506, mem. op. at 3 (N.D. Ill. Nov. 24, 1987). The district court clearly had discretion to award Dresser "any demonstrable cost incurred in bringing about [the] dismissal [of the RICO claim]." *Id.*

We affirm the district court's award of costs largely because we are bound to review it only for an abuse of discretion. Given that "the prevailing party is normally entitled to costs as of course," J. Moore, W. Taggart & J. Wicker, 6 *Moore's Federal Practice* ¶ 54.70[3], at 54-321 (1987), and that, in this case, Dresser's request was reduced by approximately one-third, we will not overturn the district court's decision. To facilitate our review of contested costs awards, we ask the district courts, in the future, to explain in some detail how they arrived at amounts they consider to be reasonable.

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[11] Corcoran argues that the court should have deducted at least the costs incurred in deposing witnesses while the motion to dismiss the fraud claim was pending. We disagree. Discovery need not cease during the pendency of a motion to dismiss.

IV.

Dresser asks us to impose sanctions against Corcoran under Fed. R. App. P. 38 with respect to Corcoran's two appeals, both of which Dresser considers frivolous. We deny Dresser's requests. Although we rejected Corcoran's arguments on appeal, we do not find them frivolous. Our determination that Dresser's conduct did not constitute a pattern of racketeering activity was not a foregone conclusion. These determinations involve fact-specific inquiries in the absence of a crystalline definition of "pattern." *See Morgan*, 804 F.2d at 976 (what constitutes a pattern "depends on the facts and circumstances of the particular case"). Considerable uncertainty generally accompanies RICO claims. In this case, the district court proceedings added to the confusion. In 1985, the district court denied Dresser's motion to dismiss, concluding that Corcoran had alleged a pattern of racketeering activity. Two years later, based on new cases but on the same alleged facts, the district court changed its mind, granting Dresser's renewed motion to dismiss on the ground that Corcoran's complaint only alleged a single scheme that injured a single victim on one occasion. In view of the district court's "equivocation," Corcoran acted reasonably in bringing this appeal before us.

Moreover, even though we affirm the district court's determination of costs, this issue is a close one. The discretion we give to the district court in determining costs against the losing party, although broad, is not unbridled. There is, to begin with, an arguable issue concerning the propriety of taxing deposition transcripts against a losing party in light of *Crawford Fitting*. In addition, the derivation of some of the court's figures is questionable. The court may not have abused its discretion in reaching its costs determination, but it was not immune from criticism. Corcoran's appeal was not frivolous.

We are disturbed greatly by the nature of Dresser's requests for sanctions. Dresser made separate requests for sanctions to correspond to the two issues on appeal. The

two requests are *identical* and generic. Dresser's lawyers make no attempt to tailor their sanctions requests to the issues of this case. Smacking of boilerplate, the duplicative requests merely restate the law regarding Rule 38 and offer a totally non-specific application of the sanctions rule to the instant case. Neither request provides any grounds for imposing sanctions against Corcoran.

Although we shall refrain from imposing sanctions against Dresser for its flippant requests for sanctions against Corcoran, we are sharply critical of the attitude that sanctions requests can with impunity automatically attach to any appeal. We expect counsel to give considerable thought to whether an appeal is frivolous before requesting Rule 38 sanctions. *See Meeks v. Jewel Companies, Inc.*, 845 F.2d 1421 (7th Cir. 1988) (per curiam). We also expect counsel to provide specific grounds for imposing sanctions.

V.

The judgments of the district court dismissing Count IV of Corcoran's complaint and awarding costs to Dresser in the amount of $41,318.50 are hereby

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CORCORAN PARTNERS, LTD., *Plaintiff,* *and* **SK HAND TOOL CORPORATION,** *Plaintiff/Counter-defendant,* *v.* **DRESSER INDUSTRIES, INC.,** *Defendant/Counter-plaintiff.*	No. 84 C 4506

MEMORANDUM OPINION AND ORDER

This cause is presently before the court on the various motions of defendant Dresser Industries, Inc. ("Dresser") with regard to the third amended complaint of plaintiffs Corcoran Partners, Ltd. ("Corcoran") and SK Hand Tool Corporation ("SK"). More specifically, Dresser has presented to the court a renewed motion to dismiss Count IV of the third amended complaint, and four separate motions for summary judgment with respect to different aspects of both Counts III and IV of the third amended complaint. For the reasons which follow, Dresser's motion to dismiss Count IV is granted, thus mooting Dresser's summary judgment motions with respect to Count IV. Dresser's various motions for summary judgment with respect to Count III of the third amended complaint are denied.

Background

Plaintiffs Corcoran and SK bring their third amended complaint against Dresser in four counts, based upon the

sale of certain assets of Dresser to Corcoran. By contract dated October 25, 1983 (the "purchase agreement"), Dresser agreed to sell its Hand Tool Division to Corcoran for a provisional purchase price of approximately $7.8 million. Pursuant to the purchase agreement, this estimated purchase price was subject to change depending upon post-closing adjustments to a balance sheet provided by Dresser (the "effective date balance sheet").

On October 26, 1983, Corcoran assigned all its rights under the purchase agreement to SK, a wholly owned subsidiary of Corcoran. In February, 1984, SK claimed, on the basis of a report done by the accounting firm Peat, Marwick, Mitchell & Co. ("Peat") that it had paid $3.5 million too much for the Hand Tool Division. SK attributed the overpayment primarily to Dresser's alleged failure to disclose liabilities.

The purchase agreement provided for arbitration of disputes pertaining to the estimated purchase price and the subsequent adjustments as shown in the effective date balance sheet. This case was originally brought in the Circuit Court of Cook County to obtain an order compelling arbitration. The case was subsequently removed to the United States District Court for the Northern District of Illinois.

As stated previously, plaintiffs' third amended complaint is comprised of four counts. Count I is brought by SK against defendant Dresser and seeks to enforce the arbitrator's award rendered pursuant to the terms of the purchase agreement. That award, rendered on July 23, 1985, found that Dresser had overstated the purchase price of the Hand Tool Division by approximately $1.3 million. Count II, also brought on behalf of SK, alleges that Dresser has breached terms of the purchase agreement. Count III, brought on behalf of both Corcoran and SK, purportedly states a cause of action for fraud. Count IV, also brought by both plaintiffs, alleges that Dresser has violated the Rack-

eteer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968. Dresser has brought a counterclaim which is not a subject of any of the motions now before the court.

Dresser's Renewed Motion to Dismiss

By memorandum opinion and order dated December 18, 1985, this court, *inter alia*, denied Dresser's motion to dismiss Count IV of the third amended complaint. One of the grounds upon which Dresser had challenged Count IV, and which this court rejected, was that plaintiffs had not properly alleged the requisite "pattern of racketeering activity" under RICO.

In order to state a cause of action under RICO, a plaintiff must allege that he was injured in his business or property by the defendant's violation of 18 U.S.C. § 1962. 18 U.S.C. § 1964(c). Section 1962 prohibits: a person who has received income from a pattern of racketeering activity from using the income in operating or establishing an enterprise, § 1962(a); a person from acquiring or maintaining an interest in an enterprise through a pattern of racketeering activity, § 1962(b); a person employed or associated with an enterprise from conducting or participating in the conduct of the enterprise through a pattern of racketeering activity, § 1962(c); or a person from conspiring to violate § 1962(a), (b), or (c), § 1962(d).

In their third amended complaint, plaintiffs allege that Dresser's sale of the Hand Tool Division was accomplished by means of a pattern of racketeering activity. Plaintiffs also allege that Dresser's agents devised a scheme to defraud plaintiffs by causing them to purchase the division at an inflated price and that, in executing the scheme, Dresser caused certain documents to be mailed and certain telephone calls to be made.

In its original motion to dismiss Count IV, Dresser contended that plaintiffs failed to allege the requisite pat-

tern of racketeering activity because, first, they failed to allege at least two acts of racketeering activity as required by 18 U.S.C. § 1961(5) and, second, they alleged only one fraudulent scheme. The court rejected both arguments, finding that plaintiffs had alleged multiple acts of racketeering activity, specifically mail and wire fraud, done in furtherance of the alleged scheme to defraud. As to Dresser's second argument, the court noted that, although some courts have held that a number of fraudulent schemes were necessary to allege a pattern of racketeering activity, this court had already reached a contrary result. This court had ruled that nothing in the language of the RICO statute required a plaintiff to allege a pattern of fraudulent schemes to state a cause of action. Rather, several acts of racketeering activity in furtherance of single fraudulent scheme could suffice. The court thus denied Dresser's motion to dismiss Count IV of plaintiffs' third amended complaint.

Now before the court is Dresser's renewed motion to dismiss Count IV. Dresser, in essence, urges the court to reconsider its previous denial of the motion to dismiss plaintiffs' RICO claims in light of two recent pronouncements on the pattern issue by the Seventh Circuit Court of Appeals.

In the first of these decisions, *Lipin Enterprises, Inc. v. Lee*, 803 F.2d 322 (7th Cir. 1986), the court declined to announce a standard as to what constitutes a pattern of racketeering activity, but held that no pattern was alleged where a purchaser claimed that the price paid for stock and been overstated. In *Morgan v. Bank of Waukegan*, 804 F.2d 970 (7th Cir. 1986), the court reaffirmed *Lipin* and, further, adopted a fact-oriented standard concerning the pattern requirement. This court agrees with Dresser that, in light of the recent announcement of a standard regarding RICO's pattern requirement, the previous denial of Dresser's motion to dismiss Count IV is ripe for reconsideration.

In *Morgan*, plaintiffs alleged that the pattern of racketeering activity consisted of various acts of mail fraud committed over a four-year period. Specifically, plaintiffs pointed to a 1978 mailing to plaintiffs made in connection with a loan obtained by defendants and guaranteed by plaintiffs. Plaintiffs also alleged 1980 and 1982 mailings made in connection with foreclosure sales concerning the venture in which plaintiffs were fraudulently induced to invest.

The *Morgan* court began its analysis of the pattern requirement by citing the Supreme Court's ruling in *Sedima, S.P.R.L. v. Imrex*, 105 S.Ct. 3275 (1985). The *Sedima* Court noted that, while a pattern of racketeering activity requires at least two acts of racketeering activity, two acts may not always suffice. *Id.* at 3285, n. 14. The Court emphasized the requirement of continuity plus relationship which must exist between the predicate acts. *Id.*

In studying the continuity aspect announced in *Sedima*, the *Morgan* court summarized the split among circuits on the specific issue of whether more than one fraudulent scheme must be alleged. *Morgan*, 804 F.2d at 974-75. The court concluded, as this court had previously, that *Sedima* does not require the existence of two separate schemes to defraud in order for the continuity aspect of the pattern requirement to be satisfied. *Id.* The *Morgan* court noted that:

> In order to be sufficiently continuous to constitute a pattern of racketeering activity, the predicate acts must be ongoing over an identified period of time so that they can fairly be viewed as constituting separate transactions, *i.e.*, "transactions 'somewhat separated in time and place,' " (citation omitted)

Id. Relevant factors to be viewed, according to *Morgan*, include "the number and variety of predicate acts and the length of time over which they were committed, the number of victims, the presence of separate schemes, and

the occurrence of distinct injuries." *Id.* In conclusion, the court announced that the "doctrinal requirement of a pattern of racketeering activity is a standard, not a rule, and as such its determination depends on the facts and circumstances of the particular case, with no one factor being necessarily determinative." *Id.* at 976.

The *Morgan* court, applying the aforementioned standard to the facts before it, found that plaintiffs had satisfied both the continuity and relationship aspects of the pattern requirement. The court observed that plaintiffs had alleged several acts of mail fraud over a period of several years in furtherance of an overall scheme to defraud. *Id.* The acts of mail fraud were distinct, some relating to two separate foreclosure sales occurring several years apart and others relating to an initial loan transaction. *Id.* Even though these acts were in furtherance of a single scheme, the court stressed the distinct nature of the acts and the four-year period over which they occurred. *Id.*

The *Morgan* court went on to apply the standard announced to other fact patterns, emphasizing the continuity requirement. The court hypothesized that a fraudulent scheme involving a false loan application, even though consisting of two predicate acts of mail fraud, would fail to satisfy the continuity aspect, since it actually involves a single fraudulent transaction at a single point in time. *Id.* The court next viewed the sufficiency of the pattern allegations in *Illinois Department of Revenue v. Phillips*, 771 F.2d 312 (7th Cir. 1985), where defendant mailed nine separate fraudulent state sales tax returns over a nine-month period. The *Morgan* court stated that the mailings were sufficient since they were "clearly distinct transactions ongoing over a period of time: each tax return was a separate lie and resulted in a separate underpayment, independent of the other lies and underpayments." *Morgan*, 804 F.2d at 976.

Finally, the *Morgan* court reaffirmed its prior ruling in *Lipin*. That case involved a fraudulent scheme whereby defendants allegedly defrauded plaintiff in the single acquisition by plaintiff of over $960,000 worth of stock. The *Morgan* court noted that, although the *Lipin* plaintiff alleged multiple predicate acts, including false statements made during negotiations for the sale, false financial statements, a false opinion letter, and other false statements, the existence of the multiple predicate acts was only due to the complicated nature of the stock transaction. *Id.* The court concluded that these acts did not satisfy the continuity aspect of the pattern requirement because all related to a single act, that being the acquisition of stock. The court noted further that the predicate acts all occurred over a fairly short period of time, related to the same transaction, involved a single scheme, single victim, and created a single injury. *Id.*

As stated previously, Dresser's original motion to dismiss Count IV focused on Dresser's contentions that plaintiffs failed to allege more than one predicate act and that more than one scheme is necessary to constitute a pattern. This court rejected the contention that more than one scheme must be alleged, a position affirmed by *Morgan*. Further, Dresser does not now challenge this court's finding that plaintiffs have alleged more than one predicate act. However, having the benefit of the *Morgan* court's extended analysis of the pattern requirement, especially the continuity aspect, this court finds that plaintiffs Corcoran and SK have failed to sufficiently allege a pattern of racketeering activity and thus grants Dresser's renewed motion to dismiss Count IV.

Allegations made by Corcoran and SK are closely analogous to those made in *Lipin*. Corcoran and SK allege predicate acts of mail and wire fraud ongoing from June, 1983 to December, 1983. All the predicate acts related to the single fraudulent scheme, that being the sale of the

Hand Tool Division. The acts alleged all involve or go toward the same transaction, occurred over a fairly short period of time, involve a single scheme, and create a single injury. The sale of the Hand Tool Division, like the sale of stock in *Lipin*, is a complex transaction which generates numerous pieces of paper and hence creates a greater number of possibly fraudulent acts. However, as recognized in *Morgan*, this fact does not make the predicate acts ongoing over a period of time so as to constitute separate transactions distinct in time and place. In short, the predicate acts alleged in the instant case do not satisfy the continuity aspect of the pattern requirement. Dresser's motion to dismiss Count IV of Corcoran and SK's third amended complaint is therefore granted.

Dresser's Motions for Summary Judgment

As stated previously, in addition to its motion to dismiss Count IV, Dresser has before the court four separate motions for summary judgment, each concerning different aspects of Counts III and IV of the third amended complaint. Because the court has dismissed Count IV, the summary judgment motions will be addressed only with respect to Count III.

Count III, brought on behalf of both Corcoran and SK, states a claim for fraud. Plaintiffs allege that Dresser, through its officers, employees and/or agents, made several false statements of material fact to plaintiffs in connection with Dresser's sale of the Hand Tool Division. Plaintiffs allege that Dresser knew or should have known of the falsity of these statements and made them for the purpose of causing plaintiffs to enter into the purchase agreement and to pay an inflated price of $7,805,000 for the Hand Tool Division. Plaintiffs further allege reliance on the misrepresentations of fact. Finally, plaintiffs allege that they were damaged in that, upon learning that Dresser had overstated assets and understated liabilities, plaintiffs were forced to curtail marketing expenditures and thus lost

sales. Plaintiffs seek $9 million compensatory damages, representing lost sales, and $10 million punitive damages.

Dresser urges the court to grant summary judgment in its favor with respect to plaintiff SK's $9 million claim for lost profits. As support, Dresser first points to the arbitrator's award, rendered pursuant to the purchase agreement, which found that plaintiffs had paid approximately $1.3 million too much for the Hand Tool Division. Dresser next points to summary judgments previously entered on its counterclaim against plaintiffs in the amounts of approximately $1.4 million, and concludes that, because SK owes Dresser $100,000 more than Dresser owes SK, Dresser did not in fact deprive SK of any cash and therefore cannot be liable for SK's decision to curtail its marketing expenditures. Dresser maintains that any curtailment by SK was done in reliance on Peat's report to SK, which found that SK may have paid as much as $3.5 million too much for the Hand Tool Division. Dresser contends that reliance on Peat's report was unreasonable since the report disclaimed opinion as to the work done therein and, further, such reliance breaks the chain of causation between Dresser's conduct and SK's injury, rendering SK's damage claim remote and speculative.

Plaintiffs answer that curtailment of marketing expenditures and corresponding lost profits are not remote and speculative damages, but are the direct result of the uncertainty as to assets and liabilities which was caused by Dresser's misrepresentations. Dresser points out, however, that the purchase agreement, which allows for post-closing adjustment to the purchase price and arbitration of disputes arising therefrom, provides for uncertainty as to the ultimate value of the Hand Tool Division.

The court agrees with plaintiffs' contention that summary judgment is not appropriate regarding the lost sales claim. Clearly, the issues of whether SK's reliance on the Peat report was reasonable, and the extent to which it

did so rely, raise questions of material fact not properly resolved through summary judgment. Further, Dresser's arguments concerning deprivation of cash are unpersuasive, since the court finds the pertinent issue to be whether Dresser's allegedly fraudulent misrepresentations caused SK to curtail expenditures and thus lose sales.

It is undisputed that remote damages are not recoverable. The court, however, does not find SK's claim for lost sales to be so remote as to be invalid. Dresser's reliance on *Madigan Inc. v. Goodman*, 498 F.2d 233 (7th Cir. 1974) as support for its contention that lost sales are remote, is unpersuasive. In *Madigan*, the court refused to allow plaintiffs to recover damages arising out of litigation which was brought by a third party. The third party had sued plaintiffs, in essence, blaming them for the fraud perpetuated by defendants. The court found these damages to be too remote because defendant could not have foreseen that a third party would blame and sue plaintiffs for the defendants' fraud. *Id.* at 239.

In the instant case, the chain of causation is intact. Clearly, SK's claim for lost sales arises out of Dresser's alleged misrepresentations. Dresser could easily have foreseen that plaintiffs and the Hand Tool Division would be damaged by fraudulently undisclosed liabilities and overstated assets. Of course, plaintiffs will have to prove their entitlement to such damages. The court finds merely that the lost sales claim is not so remote from Dresser's alleged wrongful conduct as to be unrecoverable as a matter of law. Accordingly, Dresser's motion for summary judgment with respect to SK's claim for lost sales in Count III of the third amended complaint is denied.

In conjunction with its motion for summary judgment with respect to the lost sales claim, Dresser has filed a supplemental motion seeking summary judgment as to any direct damage claim asserted by plaintiffs and based on the arbitrator's award to plaintiffs of approximately $1.3 mil-

lion. This supplemental motion is necessitated, according to Dresser, by plaintiffs' response to Dresser's main motion. In responding to Dresser's contention there that punitive damages claimed in Count III must fall with the $9 million lost sales claims, plaintiffs stated that punitive damages may also be based on the arbitrator's award of $1.3 million compensatory damages. By this statement, plaintiffs are apparently reasserting a direct damage claim in the amount of $1.3 million, a claim not expressly made in Count III of the third amended complaint.

It is clear that punitive damages may not be awarded absent actual or compensatory damages. The immediacy of Dresser's motion regarding the reasserted $1.3 million claim is undercut, however, by this court's finding that Dresser is not entitled to summary judgment on the lost sales damage claim. Clearly, at this stage, the lost sales claim can serve as the basis of a punitive damage claim. It is thus not now necessary for the court to determine whether plaintiffs properly reassert the direct damage claim based on the arbitrator's award since plaintiffs' punitive damage claim remains adjudicable. Obviously, if plaintiffs' lost sales claim fails, the court will then decide whether the reasserted direct damage claim is proper and can serve as the basis for punitive damages in Count III.

Without intending to comment on the merits of plaintiffs' claim for $1.3 million direct damages, the court initially notes that such a claim is encompassed in Count I, which seeks enforcement of the arbitration award. Further, although the claim is not expressly stated in the latest incarnation of Count III, it presents no surprise to Dresser. Finally, the court agrees with Dresser that the mere fact of an arbitrator's award does not, by itself, constitute direct damages. However, should plaintiffs be able to prove that the $1.3 million overcharge was not merely an adjustment of price, as provided for in the purchase agreement, but instead was the result of fraud, the overcharge

could constitute direct damages. As such, the pleadings could then be amended to conform with the proof. Dresser's supplemental motion for summary judgment with respect to plaintiffs' reasserted $1.3 million direct damage claim is, therefore, denied.

Dresser also seeks summary judgment as to paragraphs 3(e), 4(e) and 6(e) of Count III of the third amended complaint. These paragraphs contain allegations concerning plaintiffs' fraud claims. Specifically, plaintiffs allege in paragraph 3(e) that:

> Dresser represented in paragraph 3.2 of the Purchase Agreement that the Effective Date Balance Sheet would "fairly present in all material respects the asset values and liabilities for all items reflected thereon as of the Effective Date." At the time of the closing, Dresser represented in the "Estimated" Effective Date Balance Sheet, Exhibit A to the Purchase Agreement, that the "Estimated Purchase Price" was $7,805,000. These representations were false in that the "Estimated Effective Date Balance did not "fairly present" the value of the Division, but overstated the Estimated Purchase Price.

Plaintiffs allege in paragraph 4(e) that:

> Dresser knew or should have known that the "Estimated" Effective Date Balance Sheet did not "fairly present in all material respects the asset values and liabilities for all items reflected thereon as of the Effective Date," and that it overstated the "Estimated Purchase Price" of the Division.

Plaintiffs allege, in paragraph 6(e), that they "paid Dresser $7,805,000 based upon Dresser's representation that the Effective Date Balance Sheet would 'fairly present' the asset values and liabilities for the Division."

Dresser contends that it is entitled to summary judgment with respect to the aforementioned allegations because no representation or warranty was ever given

for the "estimated" effective date balance sheet, otherwise known as Exhibit A. By the terms of the purchase agreement, Dresser warranted only that the effective date balance sheet, not Exhibit A, would "fairly present" the value of the Hand Tool Division. Exhibit A, Dresser points out, provided only a provisional purchase price subject to post-closing adjustments through the effective date balance sheet. Dresser maintains further that summary judgment is appropriate because, while plaintiffs allege that misrepresentations were made in Exhibit A, they allege reliance on the post-closing effective date balance sheet. Finally, Dresser states that there can be no fraud in connection with its promises to "fairly present" because that phrase has a secret meaning to plaintiffs.

While it is clear that the "fairly presents" language pertains to the effective date balance sheet and not Exhibit A, the court disagrees with Dresser's contentions that this fact entitles it to summary judgment. Although no express warranties concerning accuracy were made by Dresser in connection with Exhibit A, it is clear that there should be implied a standard of good faith as to Dresser's preparation thereof. The court is unwilling, as plaintiffs suggest, to imply the "fairly presents" warranty to Exhibit A. Plaintiffs, nevertheless, should be allowed to pursue their fraud claim based on representations made in Exhibit A. Plaintiffs are thus entitled to present evidence on Dresser's purported, purposeful bad faith misrepresentations made in Exhibit A. Whether Dresser made bad faith misrepresentations is clearly an issue of fact not appropriately resolved through summary judgment.

Dresser's contention concerning a secret meaning attributed to the "fairly presents" language by plaintiff raises another issue of fact. Whether the effective date balance sheet complied with the "fairly presents" language, or was itself the result of bad faith fraudulent conduct on behalf of Dresser, thus cannot properly be resolved at this

stage in the proceedings. Finally, although paragraph 6(e) pleads reliance on the effective date balance sheet and not Exhibit A, allegations of Count III, when read as a whole, indicate reliance on several alleged fraudulent misrepresentations, including those in Exhibit A. For these reasons, the court denies Dresser's motion for summary judgment with respect to allegations of paragraphs 3(e), 4(e) and 6(e) of Count III.

Finally, Dresser urges the court to grant summary judgment in its favor with respect to Corcoran's claim for $20 million damages. Corcoran's recently asserted claim represents the loss of value in SK stock which is attributable to Dresser's alleged fraud. As stated previously, SK was a wholly owned subsidiary of Corcoran at the time that Corcoran entered the purchase agreement with Dresser. Corcoran assigned its rights under the purchase agreement to SK, and, several years later, sold SK to a third party. Dresser contends that summary judgment is appropriate because Corcoran lacks standing to assert a claim for damages suffered solely in its capacity as shareholder of SK.

It is clear that, under general principles of corporate law, a stockholder of a corporation has no right of action against third persons for damages that result indirectly to the stockholder because of an injury to the corporation. *Twohy v. First Nat. Bank of Chicago*, 758 F.2d 1185, 1194 (7th Cir. 1985). One exception to this general rule allows the stockholder an individual right of action against the wrongdoer where a special contractual duty exists between the wrongdoer and stockholder. *Id.*

This contractual duty exception applies to the instant case. Corcoran entered into the purchase agreement with Dresser. The complaint alleges several pre-closing misrepresentations. At the time of Corcoran's acquisition of the Hand Tool Division, it clearly had standing to bring a claim for fraud in the inducement of the purchase agree-

ment. Although Corcoran assigned its rights under the purchase agreement to SK, this court has already found, in memorandum opinion and order dated March 20, 1985, that the assignment only encompassed rights under the agreement and not the independant right to bring an action for tortious conduct. Because of the contractual relationship between them, Corcoran should be entitled to present its claim for loss of value of its holdings due to Dresser's alleged fraud. Dresser's motion for summary judgment with respect to Corcoran's claim is thus denied.

For the reasons stated, Dresser's motion to dismiss Count IV of plaintiffs Corcoran and SK's third amended complaint is granted, and Dresser's various motions for summary judgment with respect to Count III are denied.

ENTER:

/s/ FRANK J. MCGARR
UNITED STATES DISTRICT JUDGE

DATED: January 29, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CORCORAN PARTNERS, LTD.,
Plaintiff,

v.

SK HAND TOOL CORPORATION,
Plaintiff,
Counterdefendant,

v.

DRESSER INDUSTRIES, INC.,
Defendant,
Counterplaintiff.

No. 84 C 4506

MEMORANDUM OPINION AND ORDER

On July 28, 1987, this court entered a final judgment order enforcing an arbitration award in favor of SK Hand Tool Corporation ("SK") against Dresser Industries, Inc. ("Dresser") and entering judgment in favor of Dresser against SK as to some counts and against SK and Corcoran Partners, Ltd. ("Corcoran") as to others, which judgments in favor of Dresser and against Corcoran and SK included an award of costs.

It is the purpose of this opinion to adjudicate the bill of costs submitted by defendant Dresser supported by records and affidavits and opposed by plaintiffs Corcoran and SK.

It is the conclusion of the court that costs may be allowed and determined by the court under Rule 54(d) of the Federal Rules of Civil Procedure, but that the allowance of costs in the discretion of the court is limited to those costs enumerated in 28 U.S.C. Section 1920. Those elements of costs in that rule are: (1) fees of the Clerk and

Marshall; (2) fees of the court reporter for stenographic transcript necessarily obtained for use in the case; (3) fees and disbursements for printing and witnesses; (4) fees for exemplification and copies of papers necessarily obtained for use in the case; (5) docket fees under Section 1923 of Title 28; (6) compensation of court-appointed experts and interpreters.

It is the defense of Corcoran Partners, Ltd. and SK Hand Tool Corporation that no claimed costs not included in the above enumeration are within the discretion of the court to grant, and the court agrees with this proposition. It is further true that, with regard to those items which may legitimately be claimed as costs, the court has the discretion to recognize or decline such claims for costs as the circumstances justify.

With regard to Count III of plaintiffs' claim which was dismissed by this court, the cause of action has been refiled in the state court. Corcoran and SK argue that, under the provision that the costs taxed must be "just," it would be unjust if Dresser was permitted to tax all the costs associated with recovery on the merits of this fraud claim where there has not been a trial on the merits and where there is a state court suit pending regarding the merits of the plaintiffs' fraud claim. The court agrees with this principle and while it is difficult of precise mathematical application, it will be borne in mind in the judgments formed concerning the various claims for costs. A second argument in limitation of costs seeks to eliminate from the cost claims deposition costs which were part of discovery incurred after the motion to dismiss Count III was filed and while it was under consideration. Once again, the court recognizes the validity of this position and adopts it, and once again, in the absence of any method of separating with precision the costs subject to this exception from the complicated array of cost claims, the court will take cognizance of the general principle in its overall allocation and award of costs.

Corcoran Partners and SK also object to taxation of any costs associated with discovery on the merits of Count IV, the RICO count. Count IV was dismissed. Count IV was the result of the plaintiffs' decision to plead it, and Dresser is entitled to any demonstrable costs incurred in bringing about its dismissal.

Bearing these considerations in mind, the court turns to the specific items of cost being sought and the objections raised concerning them.

The first claim is for the cost of deposition transcripts in the amount of $40,431.45. It is argued that deposition activity was extensive and partly unnecessary, and that it should have ceased during the pendency of the motion to dismiss. As to the latter contention, there is no requirement that the discovery cease during the pendency of a motion to dismiss unless the court has ordered a stay, which was not done in this case. As to the first argument, it is apparent that the deposition activity was extensive and, to some extent, excessive. Taxation of costs does not depend upon costs incurred by a cautious and conservative litigant but rather on costs which could have been reasonably incurred in the circumstances. It is the view of the court that the 57 days of deposition fail the test of reasonableness. The expedited transcripts, however, were justified under the circumstances. The claim for deposition costs in the amount of $40,431.45 is granted in the amount of $30,000.

The claim for witness fees is in the amount of $1,154.72. Plaintiffs challenge this amount and, as the result, Dresser has recalculated the amount and reduced the claim to $1,008.50, which is appropriate and is granted.

Dresser seeks costs in the amount of $5,737.50 for the depositions of plaintiffs' experts. The $30-per-day limit on witness fees found in 28 U.S.C. Section 1821 applies to expert witnesses as well as other witnesses. Dresser seeks

to come under the "exceptional circumstances" exception to this general rule. The court disagrees. The award of expert witness fees to Dresser is in the reduced amount of $270.

Dresser claims the cost of pretrial transcripts. Corcoran and SK object that transcript costs are allowable only as to transcripts used in the trial of the case. The court disagrees. The use of pretrial transcripts may be justified if necessarily obtained for use in the case. Not all transcripts before the magistrate, however, may be deemed necessary for use in the case nor were they in this litigation, and the $80 claim for costs in this regard is allowed in the amount of $40.

Dresser seeks a total of $18,631.92 as costs for copying. The amount is extraordinarily large, and a distinction must be made between copying as a necessary part of trial preparation and copying for convenience. The universal availability of copying machines and the growing tendency to copy everything in sight for the covenience of the various people working on the case, has led to abuse in cost claims in this area. Copying costs sought are granted in the amount of $10,000.

For the foregoing reasons, the costs awarded in accord with the bill of costs submitted by Dresser Industries, Inc. against Corcoran Partners, Ltd. and SK Hand Tool Corporation, are granted in the reduced amount of $41,318.50.

ENTER:

/s/ FRANK J. MCGARR
UNITED STATES DISTRICT JUDGE

DATED: November 24, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINIOS
EASTERN DIVISION

CORCORAN PARTNERS, LTD.,
Plaintiff;
SK HAND TOOL CORPORATION,
Plaintiff, Counterdefendant,
v.
DRESSER INDUSTRIES, INC.
Defendant, Counterplaintiff.

RECEIVED
JUL 29 1987
FRANK J. McGARR
U.S. DISTRICT COURT
SENIOR JUDGE

No. 84 C 4506

Frank J. McGarr
Judge

JUDGMENT

1. Judgment is entered in favor of SK against Dresser on the arbitration award in the amount of $1,297,000.00. Interest shall be calculated from this date at the rate provided by 28 U.S.C. § 1961 which is 6.64%.

2. Judgment is entered in favor of SK against Dresser on Count II of plaintiffs' Third Amended Complaint, in the amount of $60,848.18. Interest shall be calculated from this date at the rate provided by 28 U.S.C. § 1961 which is 6.64%.

3. Judgment is entered in favor of Dresser against SK on Count I of defendant's Counterclaim in the amount of $399,744.00 and costs. Interest shall be calculated from this date at the rate provided by 28 U.S.C. § 1961 which is 6.64%.

4. Judgment is entered in favor of Dresser against SK on Count II of defendant's Counterclaim in the amount of $716,601.83 and costs. Interest shall be calculated from

this date at the rate provided by 28 U.S.C. § 1961 which is 6.64%.

5. Judgment is entered in favor of Dresser against SK on Count III of defendant's Counterclaim in the amount of $281,535.00 and costs. Interest shall be calculated from this date at the rate provided by 28 U.S.C. § 1961 which is 6.64%.

6. Judgment is entered in favor of Dresser against SK on Count IV of defendant's Counterclaim in the amount of $58,241.00 and costs. Interest shall be calculated from this date at the rate provided by 28 U.S.C. § 1961 which is 6.64%.

7. Defendant is awarded a judgment for costs against SK and Corcoran Partners on Count III of plaintiffs' Third Amended Complaint, the fraud count, which was dismissed for lack of jurisdiction on July 13, 1987, and on Count IV of plaintiffs' Third Amended Complaint, the RICO count, which was dismissed for failure to state a claim on January 29, 1987.

8. Counts V and VI of the defendant's Counterclaim are dismissed with prejudice. Count VII of defendant's Counterclaim is dismissed without prejudiced.

ENTERED:

/s/ FRANK J. MCGARR
Judge Frank J. McGarr

AGREED TO BY:
CORCORAN PARTNERS, LTD. and SK HAND TOOL CORPORATION

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88-458

No. 88-845

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

SK HAND TOOL CORPORATION
and
CORCORAN PARTNERS, LTD.,

Petitioners,

v.

DRESSER INDUSTRIES, INC.,

Respondent.

BRIEF OF DRESSER INDUSTRIES, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the district court properly determined, as affirmed by the Seventh Circuit, that predicate acts of mail and wire fraud that result in a single transaction and are committed over the course of only a few months in furtherance of a single scheme that defrauds one victim on only one occasion with no threat of continuing fraudulent activity do not satisfy the "continuity plus relationship" among the predicate acts required to plead a pattern of racketeering under *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479 (1985).

2. Whether the district court properly exercised its discretion, as affirmed by the Seventh Circuit, in awarding deposition transcript costs as "stenographic transcript[s]" under 28 U.S.C. §1920(2).

STATEMENT UNDER RULE 28.1

In accordance with Rule 28.1 of this Court, the following is a listing of the subsidiary and affiliated companies or ventures of Dresser Industries, Inc. ("Dresser") which are owned less than 100% by Dresser and which have as remaining shareholders or partners, companies which may be traded on an American stock exchange. Remaining shareholders or partners are italicized.

1. Airetool and Yost Superior Realty, Inc.
   Yost Superior Co.
2. IRI International Corporation
   Ingersoll-Rand Company
3. Dresser-Rand Company
   Ingersoll-Rand Company
4. M-I Drilling Fluids Company
   Halliburton Company
5. Dresser-Cullen Venture
   Cullen Center, Inc.
6. Swaco Geolograph Company
   Geolograph Pioneer Inc.
7. Western Atlas International, Inc.
   Litton Industries, Inc.
8. M-I Drilling Fluids Canada, Inc.
   Halliburton Company
9. Worthington Pump (H.K.) Ltd.
   Cooper Industries, Inc.
10. KRW Energy Systems Inc.
    Westinghouse Electric Corporation
11. Bartil, Inc.
    Tilko, Inc.

12. Thermal Development Partnership, L.P.
CEA Tracy, Inc.
Thermal Energy Development Corporation

13. Frontier Energy Associates, L.P.
NCNB Equity Corporation
XIOX Corporation

No other non-wholly owned affiliate or subsidiary of Dresser is traded on an American stock exchange. There are scores of companies in which Dresser has ownership interests, but which Dresser does not wholly own.

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2. Certiorari Should Not Be Granted On The Costs Issue Because The Seventh Circuit Decision Affirming The District Court's Exercise Of Discretion To Award Costs For Deposition Transcripts Is Consistent With This Court's Decision In *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, And With Post-*Crawford* Interpretations Of 28 U.S.C. §1920(2) Adopted By The Fourth, Fifth, And Tenth Circuits 8

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No. 88-845

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

SK HAND TOOL CORPORATION
and
CORCORAN PARTNERS, LTD.,

Petitioners,

v.

DRESSER INDUSTRIES, INC.,

Respondent.

BRIEF OF DRESSER INDUSTRIES, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Dresser Industries, Inc. ("Dresser") opposes the petition for certiorari to the United States Court of Appeals for the Seventh Circuit filed by plaintiffs SK Hand Tool Corporation ("SK") and Corcoran Partners, Ltd. ("Corcoran").

THE OPINIONS AND JUDGMENTS BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit, dated July 18, 1988, is published in 852 F.2d 936, and reprinted in the Appendix to the petition

for certiorari (pp. A-1 to A-19). The Memorandum Opinions of the District Court are not reported officially, but are reprinted in the Appendix to the petition for certiorari (pp. A-20 to A-34 and A-36 to A-38).

JURISDICTION

The Petition For A Writ of Certiorari To The United States Court of Appeals For The Seventh Circuit, filed by the plaintiffs under 28 U.S.C. § 1254(1) to review the Opinion and Judgment of July 18, 1988, was received by Dresser on September 13, 1988.

STATUTORY PROVISIONS

The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 states, in relevant part:

> § 1961. Definitions.
>
> As used in this chapter –
>
> (5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;. . .

28 U.S.C. § 1920 states:

> A judge or clerk of any court of the United States may tax as costs the following:
>
> (1) Fees of the clerk and marshal;
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> (3) Fees and disbursements for printing and witnesses;
>
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

STATEMENT OF THE CASE

In October, 1983, Dresser sold the bulk of the assets constituting its Hand Tool Division to Corcoran, who in turn incorporated and operated the business as SK. The sale agreement provided for the arbitration of certain disputes regarding the Effective Date Balance Sheet from which the $7.8 million purchase price was determined. When disputes arose, plaintiffs initially sued Dresser in 1984 to compel arbitration, but later enlarged their action to allege fraud and violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968. Subject matter jurisdiction in the district court was based on 28 U.S.C. § 1331 as to the RICO claim and on principles of pendant jurisdiction as to plaintiffs' state law claims.

On October 15, 1985, plaintiffs filed their Third Amended Complaint (the "Complaint"), again alleging RICO violations and claiming more than $27 million in damages. Plaintiffs' RICO claim alleged that Dresser, by its agents, had schemed to defraud plaintiffs by overstating the value of the Hand Tool Division and that another purpose and effect of said scheme was to deceive Dresser's officers and directors, as well as the investing public.

On January 29, 1987, the district court granted Dresser's motion to dismiss plaintiffs' RICO claim based upon its failure to allege a pattern of racketeering. As the district court held:

> All the predicate acts related to the single fraudulent scheme, that being the sale of the Hand Tool Division. The acts alleged all involve or go toward the same transaction, occurred over a fairly short period of time, involve a single scheme, and create a single injury. * * * In short, the predicate acts alleged in the instant case do not satisfy the continuity aspect of the pattern requirement.

(Memorandum Opinion of the District Court reprinted in the Appendix to the petition for certiorari (pp. A-20 at A-26-A-27)).

On July 28, 1987, a final judgment was entered dismissing plaintiffs' only remaining state law claim for lack of subject matter jurisdiction. On November 24, 1987, the district court awarded Dresser its costs in the amount of $41,318.50.[1]

On appeal, the Seventh Circuit affirmed both the dismissal of plaintiffs' RICO claim and Dresser's cost award. *SK Hand Tool Corporation v. Dresser Industries, Inc.* , 852 F.2d 936 (C.A. 7, 1988). Finding that plaintiffs' Complaint failed allege a pattern of racketeering, the Seventh Circuit held:

> In the present case, Dresser's several acts of mail and wire fraud resulted in a single transaction. These predicate acts were committed over the course of a few months in furtherance of a scheme to receive more for the division than it was worth, but they defrauded only one victim (Corcoran) on only one occasion (the sale of the division). * * * Moreover, as in *Lipin*, there has been no threat of continuing fraudulent activity by Dresser after the division was sold.

---

[1] On June 10, 1988, a third judgment was entered by the district court awarding Dresser sanctions under Rule 11, Federal Rules of Civil Procedure. Plaintiffs currently are appealing that judgment in the United States Court of Appeals for the Seventh Circuit.

852 F.2d at 940. Rejecting plaintiffs' argument that they had alleged a pattern of racketeering because the Complaint alleged two schemes (one to defraud plaintiffs and a second scheme to deceive Dresser itself), the Seventh Circuit concluded:

> In a suit against Dresser, the only relevant scheme is the one perpetrated by Dresser to defraud Corcoran. * * * Dresser cannot be held vicariously liable under RICO for the independent acts of its employees. *D&S Auto Parts, Inc. v. Schwartz*, 838 F.2d 964, 968 (7th Cir.), *cert. denied*, ___U.S. ___, 108 S.Ct. 2833, 100 L.Ed.2d ___(1988).

852 F.2d at 941. Furthermore, the Seventh Circuit noted that acceptance of plaintiffs' "two-scheme" argument would require that Court to find a multiple scheme transaction every time some, but not all, the employees of a defendant corporation were aware of the fraudulent conduct. 852 F.2d at 941, n. 8.

The Seventh Circuit also upheld the district court's exercise of discretion to award Dresser its deposition transcript costs as "stenographic transcript[s]" allowable under 28 U.S.C. § 1920(2). *SK Hand Tool Corporation v. Dresser Industries, Inc.* 852 F.2d 936, 934-44 (C.A. 7, 1988). The Seventh Circuit rejected plaintiffs' argument that under this Court's decision in *Crawford Fitting Co. v. J. T. Gibbons, Inc.* , ___U.S. ___, 107 S.Ct. 2494 (1987), the district court lacked authority to award costs for deposition transcripts because such costs are not specifically enumerated in 28 U.S.C. § 1920. 852 F.2d at 943-44. As the Seventh Circuit concluded:

> Even though section 1920 does not specifically mention depositions, we do not think that *Crawford Fitting* necessarily precludes courts from finding that deposition transcripts are authorized by that statute. We agree with the Fifth Circuit that the Supreme Court did not "prevent courts from interpreting the meaning of the phrases used in § 1920." *West Wind Africa Line, Ltd. v. Corpus*

Christi Marine Servs., 834 F.2d 1232, 1238 (5th Cir. 1988); [citations omitted].

852 F.2d at 944.

REASONS WHY THIS CAUSE SHOULD NOT BE REVIEWED BY THIS COURT

1. **CERTIORARI SHOULD NOT BE GRANTED ON THE RICO ISSUE BECAUSE (1) THE RICO PATTERN STANDARD APPLIED BY THE SEVENTH CIRCUIT HERE IS CONSISTENT WITH THE STANDARD APPLIED IN OTHER CIRCUITS EXCEPT THE EIGHTH CIRCUIT; (2) THE EIGHTH CIRCUIT REQUIRES A GREATER SHOWING BY PLAINTIFFS TO ESTABLISH A PATTERN THAN DOES THE SEVENTH CIRCUIT, AND THIS COURT HAS GRANTED CERTIORARI TO REVIEW THE EIGHTH CIRCUIT'S STANDARD; AND (3) AFFIRMANCE OR REVERSAL OF THE EIGHTH CIRCUIT WILL NOT AFFECT THE RESULT IN THIS CASE.**

Contrary to plaintiffs' assertion, the RICO pattern issue now before this Court in *H.J. Inc. v. Northwestern Bell Telephone Company*, 829 F.2d 648 (C.A. 8, 1987), *cert. granted*, 108 S.Ct. 1219 (1988), is *not* "essentially the same issue" raised in the instant petition (Petition, p. 4). As plaintiffs concede, the Eighth Circuit's decision in *H.J. Inc.* requires a RICO plaintiff to "allege more than one scheme" to establish a pattern of racketeering (Petition, p. 5). In sharp contrast, the Seventh Circuit never has adopted a *per se* multiple-scheme requirement (*see Liquid Air Corporation v. Rogers*, 834 F.2d 1297 (C.A. 7, 1987); *Appley v. West*, 832 F.2d 1021 (C.A. 7, 1987)) and, contrary to plaintiffs' contention, it did not do so in this case. *SK Hand Tool Corporation v. Dresser*, 852 F.2d 936, 941 (C.A. 7, 1988). These decisions show that the standard adopted

by the Seventh Circuit recognizes that a pattern of racketeering activity may be found in some cases where there is only a single racketeering scheme.

Furthermore, the Seventh Circuit expressly considered whether the standard which it applied here was the same as the Eighth Circuit's standard applied in *H.J. Inc.*, inasmuch as plaintiffs pointed out to the Seventh Circuit both at oral argument and by letter filed with the Seventh Circuit on April 14, 1988, that certiorari had been granted in *H.J. Inc.* As the Seventh Circuit's decision clearly evidences, *H.J. Inc.* does not reflect the pattern test adopted in the Seventh Circuit and applied in this case.

Accordingly, the Seventh Circuit's decision is entirely consistent with cases decided in the Second, Third, Fifth, Ninth and Eleventh Circuits that also have rejected a multiple-schemes pattern test (Petition, p. 5). In view of this Court's denial of certiorari in one such similar case, *United States v. Ianniello*, 808 F.2d 184 (C.A. 2, 1986), *cert. den.*, 107 S.Ct. 3229 (1987), it is clear that the instant case also fails to raise a RICO question meriting this Court's review.[2]

The Eighth Circuit has differed with the other circuits by requiring plaintiffs to allege more than one scheme. This Court has granted certiorari to review the Eighth Circuit's standard. 108 S.Ct. 1219 (1988). However, since the Eighth Circuit requires a greater showing by plaintiffs

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[2] In its Statement Of The Case, the Petition continues to argue, as plaintiffs argued before the Seventh Circuit, that they had alleged two fraudulent schemes – one to deceive Dresser's directors and the investing public, and the other to deceive plaintiffs. As the Seventh Circuit noted in its decision, "In a suit against Dresser, the only relevant scheme is the one perpetrated by Dresser to defraud Corcoran". 852 F.2d at 941. The Seventh Circuit held that "Dresser cannot be held vicariously liable under RICO for the independent acts of its employees," citing its decision in *D&S Auto Parts, Inc. v. Schwartz* as to which certiorari already had been denied. 852 F.2d at 941.

to establish a racketeering pattern than does the Seventh Circuit, neither affirmance nor reversal of the Eighth Circuit's decision in *H.J. Inc.* will affect the result in this case. Affirmance of *H.J. Inc.* would require *a fortiori* affirmance in this case. Reversal in *H.J. Inc.* would uphold the more discriminating standard applied by the Seventh Circuit in this case.

2. CERTIORARI SHOULD NOT BE GRANTED ON THE COSTS ISSUE BECAUSE THE SEVENTH CIRCUIT DECISION AFFIRMING THE DISTRICT COURT'S EXERCISE OF DISCRETION TO AWARD COSTS FOR DEPOSITION TRANSCRIPTS IS CONSISTENT WITH THIS COURT'S DECISION IN *CRAWFORD FITTING CO. V. J.T. GIBBONS, INC.* AND CONSISTENT WITH POST-*CRAWFORD* INTERPRETATIONS OF 28 U.S.C. § 1920(2) ADOPTED BY THE FOURTH, FIFTH, AND TENTH CIRCUITS.

In *Crawford Fitting Co. v. J.T. Gibbons, Inc.* , this Court held that "[s]ection 1920 enumerates expenses that a federal court may tax as a cost under the discretionary authority found in Rule 54(d)." __U.S. __, 107 S.Ct. 2494, 2497 (1987). The Seventh Circuit's affirmance of Dresser's award of deposition transcript costs as "stenographic transcript[s]" allowable under § 1920(2) is not in conflict with *Crawford Fitting*. As the Seventh Circuit concluded, though *Crawford Fitting* limits judicial discretion with regard to the kind of expenses that may be recovered as costs, it does not " 'prevent courts from interpreting the meaning of the phrases used in § 1920' ". *SK Hand Tool Corporation*, 852 F.2d at 944, *quoting West Wind Africa Line, Ltd. v. Corpus Christi Marine Servs.*, 834 F.2d 1232, 1238 (C.A. 5 1988). Post-*Crawford* interpretations of § 1920(2) by the Fourth and Tenth Circuits agree with the result reached by the Seventh and Fifth Courts. *La Vay*

Corporation v. Dominion Federal Savings & Loan Association, 830 F.2d 522, 528 (C.A. 4, 1987) (reasonably necessary deposition transcript costs are recoverable, but *Crawford Fitting* requires denial of certain expert fees), *cert. den.*, 108 S.Ct. 1027 (1988); *Furr v. AT&T Technologies, Inc.*, 824 F.2d 1537, 1550 (C.A. 10, 1987) (section 1920 permits recovery for reasonably necessary deposition transcripts and *Crawford Fitting* limits the recovery of expert witness fees).

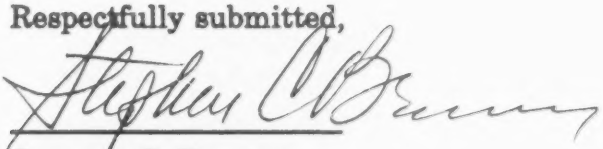
As further indication that certiorari should not be granted this Court recently denied certiorari in *La Vay Corporation v. Dominion Federal Savings & Loan Association*, 830 F.2d 522 (C.A. 4, 1987), *cert. den.*, 108 S.Ct. 1927 (1988), a case raising this same issue and relied upon by the Seventh Circuit as support for its conclusion that *Crawford Fitting* does not preclude judicial interpretation of the meaning of the phrases used in § 1920. *SK Hand Tool Corporation*, 852 F.2d at 944.

In short, there is no conflict between the Seventh Circuit and this Court, or between the Seventh Circuit and other circuits; rather, the conflict here is between plaintiffs' narrow, wooden interpretation of *Crawford Fitting* and the more reasonable interpretation adopted by the Fourth, Fifth, Seventh and Tenth Circuits.

CONCLUSION

The Seventh Circuit Court of Appeals' decision does not conflict with the law on costs in other circuits or with this Court's decision in *Crawford Fitting*. Plaintiffs' efforts to create false conflicts and to liken this case to *H.J. Inc.* merely evidence the weakness of their petition and underscore the obvious conclusion that this is not a case meriting this Court's review.

Respectfully submitted,



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